E & L Transport Company *and* Local 710, Highway Drivers, Dockmen, Spotters, Rampmen, Meat Packing House and Allied Products Drivers and Helpers, Office Workers and Miscellaneous Employees, Chicago/Vicinity, Illinois. Case 13–CA–29431

December 31, 1998

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On October 18, 1994, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] which adopted with modifications a decision by Administrative Law Judge Russell M. King Jr. finding, inter alia, that the Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire and refusing to hire any of four employees for a confidential secretary position. Subsequently, the Respondent petitioned the Seventh Circuit for review of the Board's Order, and the General Counsel cross-petitioned for enforcement of the Order. In a decision issued on June 5, 1996,[2] the Seventh Circuit denied enforcement in part, granted enforcement in part, and remanded to the Board the issue of whether the Respondent had discriminated against any of the four employees by failing to consider them as applicants for the position of confidential secretary.

On August 28, 1996, the Board notified the parties to this proceeding that it was accepting the remand from the Seventh Circuit, and that they could file statements of position regarding the issues raised by the remand. The Respondent then filed a motion to reopen the record on remand, a brief in support thereof, and a statement of position; the General Counsel filed a statement of position, and an opposition brief to the Respondent's motion to reopen the record; the Charging Party filed a statement of position; and the Respondent filed a reply to the General Counsel's and the Charging Party's statements of position.

Regarding the issue on remand, the Seventh Circuit noted that the Board, in its underlying decision, had applied reasoning different from that of the administrative law judge while affirming his conclusion that the Respondent had violated Section 8(a)(3) and (1) of the Act by refusing to consider four union members for the position of confidential secretary. The Board had observed, first, that the judge had not determined whether the alleged confidential position had actually met the "labor nexus" test.[3] The Board had then stated that assuming that the position at issue did meet the "labor nexus" test, applicants for that position are still within the definition of "employee" and, as a result, are accorded the antidiscrimination protections of the Act pursuant to *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 182–187 (1941).[4] The Board had then articulated a defense for employers charged with discriminating against applicants for confidential labor nexus positions:[5]

> [A]n employer would have to show more than mere membership in a union or past union activities in order to disqualify an applicant for being considered for a confidential position; rather, the employer would have to prove by objective evidence that it has reasonable grounds for believing that an applicant will be disloyal or will impair business operations. 315 NLRB at 304 fn. 10.

The Seventh Circuit found that the scope of the Board's defense for employers charged with discriminating against applicants for confidential positions was more limited than the defense that the Board has accorded employers that discharge current confidential employees. The court found that, under previous Board decisions, "an employer is entitled to transfer or discharge a confidential employee where the employer can prove that there was 'more than a conjectural possibility' that the employee 'might' disclose confidential labor relations information,"[6] citing *Raytheon Corp*., 279 NLRB 245, 248 (1986). As the Board there explained, the "suspicion, doubt, or fear that an employee with actual or potential access to confidential labor relations material might divulge or leak it is sufficient to justify an employer's action against an employee." Id. at 249, quoting *Emanuel Hospital*, 268 NLRB 1344, 1348 (1984).[7]

The court also noted, however, that there is one "significant limitation" to the defense available to employers who transfer or terminate current confidential employees: an employer cannot escape liability where its action was motivated not by a genuine desire to protect its confidential information but rather by a desire to retaliate against the individual for his union activities. 85 F.3d at 1266, citing *Lucky Stores*, 269 NLRB 942, 945 (1984).

The court stated that it could see no reason for the disparity in treatment accorded by the Board between applicants and current confidential employees. 85 F.3d at 1266–1267. The court summarized as follows:

> [W]e hold that the Board's decision in the instant case requiring an employer to prove with objective evidence that the applicant will be disloyal with evidence other

[1] 315 NLRB 303.

[2] 85 F.3d 1258.

[3] The court indicated that the "labor nexus" test "denotes those employees who, as a result of their close association with management, have traditionally been afforded limited protections under the Act. The NLRB's definition, approved by the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp*., 454 U.S. 170, 189 (1981), provides that employees with a labor nexus include only 'those employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.'" 85 F.3d at 1264 fn. 3.

[4] 315 NLRB at 304.

[5] 85 F.3d at 1263–1264.

[6] Id. at 1266.

[7] 85 F.3d at 1266.

> than the applicant's union membership or past union activities is not a rational construction of the Act. Instead, the Board's defense to employers who terminate confidential employees where there is more than a conjectural possibility of disclosure is also a proper defense against charges of discrimination in the hiring for confidential positions with a labor nexus. 85 F.3d at 1268.

The court further noted that this defense (denoted the "mere possibility" defense) applies only to applicants for positions that involve access to confidential labor relations material which, by definition, includes labor nexus positions. Thus, in remanding the issue of whether the Respondent had unlawfully refused to consider the four union members as applicants for the confidential secretary position, the court stated that (1) the Board had to make a determination as to whether or not the confidential secretary position at issue had a labor nexus; and (2) if the Board found it to be a confidential position with a labor nexus, the Board must then reach the issue of whether the employer adequately proved the "mere possibility" defense. The court also noted that whether the defense protects an employer from liability depends on whether the possibility of disclosure of confidential information, or a different, improper motive, caused the employer not to interview or hire the applicants. 85 F.3d at 1268.

Accepting the court's remand as the law of the case, we first address whether the confidential secretary position at issue here has a labor nexus. This position was held by Judy Nilsen, who worked as the confidential secretary to Terminal Manager Ron O'Reilly. O'Reilly was the highest ranking management official at the terminal. According to his unrebutted testimony, his duties included conducting labor relations and interacting with Gene Wade, the business manager for Local 710, and other union officials. O'Reilly was responsible for negotiating agreements between the Respondent and Local 710, and for processing grievances at the local level. On behalf of the Chicago terminal, he also was responsible for suggesting changes to the collective-bargaining agreement between the Company and the Union in preparation for upcoming contract negotiations.

As confidential secretary to O'Reilly, Nilsen handled reports involving accidents, injuries, workers' compensation claims, and maintained the personnel files of the drivers and mechanics represented by the Union. She handled correspondence between O'Reilly and the Union, assisted in processing grievances, and prepared documentation of the processing of the grievances at the local level hearings. She also typed the minutes of the local level hearings on grievances. The record shows that Nilsen prepared numerous labor-related documents at O'Reilly's direction, including correspondence from O'Reilly to employees and management personnel at the Chicago facility and to the Union regarding labor and policy matters; correspondence concerning Company policy with upper management; disciplinary notices and correspondence concerning discipline of drivers; documentation of grievances and grievance proceedings; and other management and labor related matters.

Of particular importance is the fact that on behalf of the Chicago terminal, Nilsen typed a memorandum from O'Reilly to Larry Murray, the Company's director of labor relations, which contained O'Reilly's proposed changes to the collective-bargaining agreement between the Company and the Union. The memorandum was dated November 20, 1990, and applied to a collective-bargaining agreement which was to expire on May 31, 1991, and for which negotiations had not yet begun. Nilsen also typed a letter dated November 1, 1990, from O'Reilly to Perchie Adkins, vice president of the Company, regarding proposed cutbacks and layoffs for the remainder of 1990 at the Chicago terminal. Nilsen also prepared suspension and discharge notices to employees, and interoffice memoranda concerning labor relations policies at the Chicago terminal.

As noted, the Supreme Court, in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189 (1981), endorsed the Board's definition that employees in a position with a labor nexus "assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." More specifically, in *Intermountain Rural Electric Assn.*, 277 NLRB 1, 4 (1985), the Board stated that to satisfy the labor nexus test an employee must be "involved in a close working relationship with an individual who decides and effectuates management labor policy and is entrusted with decisions and information regarding the policy before it is made known to those affected by [such decisions]." Here, it is clear that O'Reilly formulated, determined, and effectuated the Respondent's labor relations policies at the Chicago terminal. Further, the record also is clear that Nilsen both prepared confidential documents and had regular access to confidential information regarding reports or correspondence documenting the Respondent's position in collective bargaining and labor relations policy matters before this information was transmitted to the Union or to the employees at issue. Thus, in light of her ongoing access to labor relations information before the Union or the employees involved became aware of such information, we find that the confidential secretary position held by Nilsen was that of a confidential position with a labor nexus. *Associated Day Care Services*, 269 NLRB 178, 181 (1984).

We turn now to the second prong of the court's remand, whether the Respondent in this case has adequately proved the "mere possibility" defense. In this regard, we note that the Respondent has filed a motion to reopen the record on remand and a brief in support thereof. The Respondent contends that the "mere possi-

bility" defense set out by the court did not exist for applicants to confidential positions before the court's ruling in this matter; thus, the parties did not know nor could they have known of this defense before the court issued its opinion and remanded the proceeding to the Board for application of the new defense. Therefore, the Respondent contends that the parties could not adduce sufficient evidence or argue that defense prior to the time the record closed. The Respondent argues that it is possible that testimony regarding the concerns of its management relating to the possibility of disclosure of labor-related matters by confidential employees with strong union affiliations, if adduced and credited, could produce a different result on the issue of the Respondent's alleged discrimination regarding the confidential secretary position. Thus, the Respondent requests the Board to grant its motion to reopen the record and adduce testimonial and/or documentary evidence in support of the "mere possibility" defense.

In light of the fact that the "mere possibility" defense was set out by the Seventh Circuit and was not known by the parties as a possible defense in this proceeding until after the hearing had closed, we agree with the Respondent that the parties should now be granted an opportunity to adduce evidence and to formulate arguments and positions regarding this defense. Thus, we grant the Respondent's motion to reopen the record on remand, and we shall remand this proceeding to an administrative law judge for the taking of evidence on this issue.

IT IS ORDERED that this proceeding be remanded to the chief administrative law judge for assignment, and for the taking of further evidence regarding the "mere possibility" defense articulated by the Seventh Circuit. The judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.